No. 75889-1

FAIRHURST, J. (dissenting) – The city of Des Moines properly withheld the public records that David Koenig requested because it would *necessarily have identified a child victim of sexual assault* in violation of former RCW 42.17.31901 (1992)[1] by complying with his request. I would hold that the records were exempt in their entirety and, thus, reverse the Court of Appeals. To hold otherwise would be to swallow entirely the protection that former RCW 42.17.31901 affords to child victims of sexual assault. I dissent.

I. ANALYSIS

Our review must begin by clarifying the scope of the main issue before us. At times during briefing at each level of judicial review, the issue of whether Koenig would have been able to obtain the records at issue by virtue of his parental relationship to the minor victim or through other avenues has been discussed. But the focus of Koenig's suit presently on appeal is whether the records are exempt from or subject to *public disclosure*. "The fact that material may be available in

[1]*Repealed by* Laws of 2005, ch. 274, § 429 (effective July 1, 2006), *and recodified at* RCW 42.56.240(5) (Laws of 2005, ch. 274, § 404).

other records is not a reason stated in the act for failure to disclose." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978). Koenig has chosen to litigate only whether the records are exempt from public disclosure requirements. By doing so, he is asking this court to hold that any member of the public who requests the sexual assault file of a child victim by *naming the child* is entitled to receive that specific file. Koenig's relationship with the victim is irrelevant, as "[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate [any] statute which exempts or prohibits disclosure of specific information or records to certain persons." Former RCW 42.17.270 (1987).[2]

As the majority itself acknowledges, the legislature passed former RCW 42.17.31901 for the express purpose of "'assur[ing] child victims of sexual assault and their families that the identities and locations of child victims will remain confidential.'" Majority at 12-13 (quoting Laws of 1992, ch. 188, § 1). It is axiomatic, therefore, that when a public disclosure request is so specific that it asks for police records only with respect to *one named child victim of sexual assault*, the

[2]*Recodified as* RCW 42.56.080 (Laws of 2005, ch. 274, § 103), *and amended by* Laws of 2005, ch. 274, § 285.

responding agency is prohibited from turning over the requested records to prevent "revealing the identity of child victims of sexual assault." Former RCW 42.17.31901. That is, if the requester asks for the records of one named victim and the agency turns over those records to the requester, then all the redaction in the world cannot possibly prevent the requester from linking the information surrounding the sexual assault with the identification of the child victim. Any redaction would be meaningless; it is the *act* of complying with the public records request that identifies an individual as a child victim of sexual assault and links specific--often-times graphic or offensive--information contained within a report to one specifically named child.

Koenig argues that because "identifying information" means "the child victim's name, address, location, photograph," and "relationship between the child and the alleged perpetrator," the city's duty to comply with former RCW 42.17.31901 is limited to redacting such information without regard to the fact that its very compliance with a public disclosure request contradicts that redaction. Resp't/Cross Appellant's Resp. Br. at 4 (quoting former RCW 42.17.31901). He argues that the rule that courts must read exemptions narrowly requires us to so limit former RCW 42.17.31901. *See* former RCW 42.17.251 (1992)[3] ("The public

[3]*Recodified as* RCW 42.56.030 (Laws of 2005, ch. 274, § 103), *and amended by* Laws of

records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed").

However, in cases such as the present one, when a requester asks only for the records of one specifically named individual, the very act of complying with the request violates former RCW 42.17.31901 and what the statute prohibits--revealing the identity of child victims of sexual assault who are under age 18. Here, redacting the "identifying information" does nothing to prevent the identification of a specifically named person as a child victim of sexual assault. Further, the redaction requirement found in former RCW 42.17.310(2) (1996)[4] does not apply to former RCW 42.17.31901.[5] *See Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 125 Wn.2d 243, 261 n.8, 884 P.2d 592 (1994) ("This requirement applies by its terms only to those exemptions at RCW 42.17.310. The 10 exemptions listed in RCW

2005, ch. 274, § 283.

[4]*Recodified as* 42.56.210(1) (Laws of 2005, ch. 274, § 103), *and reenacted and amended by* Laws of 2005, ch. 274, § 402.

[5]The majority claims that rather than arguing that the records at issue here are exempt from disclosure because they contain identifying information, I am arguing only that they are exempt because the redaction requirement does not apply to former RCW 42.17.31901. Majority at 8 n.7. The majority misconstrues my position; I am arguing both. The redaction requirement does not apply to requests made under former RCW 42.17.31901. However, *even if* such requests were subject to redaction and the city redacted the identifying information, the city would be disclosing the victim's identity because Koenig named the victim in his request. The majority also claims that when the legislature recodified the public records act in 2005, the section relating to records of child victims of sexual assault became subject to the redaction requirement. Majority at 8 n.7. However, as my argument above demonstrates, that change does not alter my analysis of the circumstances presented here.

42.17.312-.31902 are therefore not subject to the redaction requirement of RCW 42.17.310(2).").[6]

Koenig also argues that conditioning compliance of a public disclosure request based on the knowledge of the requester is prohibited. But to deny a request as specific as his is not based on the knowledge of the requester but on the *nature of the request.* This is not the same as denying disclosure by reason of the requester's identity or purpose for seeking the records. *See Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993) (prohibiting consideration of "the identity of the requesting party or the purpose of the request" in determining whether a particular record is of legitimate public concern).

The underlying problem with the majority's holding is that while it acknowledges, as it must, that the overarching purpose of former RCW 42.17.31901 is to protect the identity of child victims of sexual assault *from public disclosure*, it equates requesting records for a specifically named individual to requesting records using a case number or the name of the assailant, as if there is no difference between

[6]The majority claims that my reliance on this statement is misplaced because the plain language of former RCW 42.17.31901 prohibits only disclosure of identifying information, not entire records. Majority at 8 n.7. However, the text of former RCW 42.17.31901 clearly prohibits the city from providing "information revealing the identity of" the victim. Even if the city removed information from the records that revealed the victim's identity, the fact remains that Koenig already knew the victim's identity because he named the victim in his request. Thus, the only way the city could avoid revealing the victim's identity was to withhold the record.

the two. Majority at 8. By making this specific comparison, the majority demonstrates its fundamental misunderstanding of the issue.

If a person makes a public records request using the case number or name of the assailant but does not specifically name an individual as the subject of the records sought and the requester nonetheless deduces the identity of the individual who is the subject of such records, *the city* does not reveal the individual's identity. In contrast, when a requester asks for Jane Doe's sexual assault records, the city, by disclosing such records, *positively informs* the requester that Jane Doe is a child victim of sexual assault and the subject of the produced records. Although the majority emphasizes the fact that a requester could deduce the subject's identity by employing a variety of methods, *the city* violates former RCW 42.17.31901 only if it discloses the identity of the individual. The city *necessarily discloses* the identity of the individual when the requester asks for the records of a specific individual.

Even the Court of Appeals recognized the logic of this argument--that when a request specifically identifies the individual about whom records are sought, the entire record should be exempt because to disclose the record with identifying information blacked out would be meaningless protection in light of the nature of the request. *Koenig v. City of Des Moines*, 123 Wn. App. 285, 95 P.3d 777 (2004).

However, that court erroneously held that the plain language of the statute exempted "specifically defined information from disclosure, and nothing more" because it failed to consider how absurd and unreasonable the results would be. *Id*. at 294. Similarly, the majority claims we must seek support from statutory language or case law to "look beyond the four corners of the records at issue to determine if they were properly withheld." Majority at 9. However, simple common sense will suffice to determine that the majority's application of the statute will lead to absurd results. "Unlikely, absurd or strained consequences resulting from a literal reading [of a statute] should be avoided." *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

Under the majority's ruling, any person or entity (including a newspaper) may simply walk into an agency and request "any information you have where [insert name of person] was a victim of sexual assault when she was under 18 years of age," and the agency would be required to turn over such records, redacting only the victim's name and other "identifying information," knowing full well that the redaction accomplishes nothing because by fulfilling the request the disclosing agency has positively identified the named person as a child victim of sexual assault.

III. CONCLUSION

I would reverse the Court of Appeals and hold that the public records at issue were exempt from disclosure pursuant to former RCW 42.17.31901.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Bobbe J. Bridge